BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Consolidated Matters of: MIDDLETOWN UNIFIED SCHOOL DISTRICT, v. PARENT ON BEHALF OF STUDENT,	OAH Case No. 2018110516
PARENT ON BEHALF OF STUDENT, v. MIDDLETOWN UNIFIED SCHOOL DISTRICT.	OAH Case No. 2019030238 ORDER FOLLOWING PREHEARING CONFERENCE

On April 22, 2019, a telephonic prehearing conference was held before Administrative Law Judge Charles Marson, Office of Administrative Hearings. Jennifer E. Nix, Attorney at Law, appeared on behalf of Middletown Unified School District. Betsy J. Brazy, Attorney at Law, appeared on behalf of Student. The PHC was recorded.

Based on discussion with the parties, the ALJ issues the following order:

1. Hearing Dates, Times and Location. The hearing shall take place in the library of Middletown Middle School, 20932 Big Canyon Road, Middletown, California 95461. It shall take place on April 30 and May 1 and 2, 2019, and continue day-to-day thereafter at the discretion of the ALJ. If hearing is held on May 7, 2019, an early recess will be taken to accommodate a participant's medical need. The hearing shall begin at 9:30 a.m. on the first day of hearing and at 9:00 a.m. on all other days, unless otherwise ordered.

As ordered in the scheduling order, Middletown shall provide a facility for the hearing that fully complies with the Americans with Disabilities Act of 1990 (42 U.S.C.A. § 12101 et seq.), the Rehabilitation Act of 1973 (29 U.S.C. § 794 et seq.), the Unruh Civil Rights Act (Civ. Code, § 51 et seq.), and all laws governing accessibility of government facilities to persons with disabilities. Within two business days of the date of this order, Middletown shall file a certification in the principal case that the facilities to be used for this case comply with those laws.

Prior to the beginning of the hearing, Middletown shall ensure that the hearing room is configured into a courtroom setting and shall have at a minimum (1) a table for Student and his representatives; (2) a table for Middletown's legal representative and special education representative; (3) a table for the witness; and (4) a table for the ALJ, near an electrical outlet. Middletown shall provide drinking water and have tissue available to all parties, witnesses and the ALJ. Unless otherwise ordered, the same hearing room shall be used for each day of hearing and shall be available at least one hour prior to the commencement of the hearing each day. The hearing room shall be locked at lunch breaks and following the hearing each night.

The parties shall immediately notify all potential witnesses of the hearing dates, and shall subpoena witnesses if necessary, to ensure that the witnesses will be available to testify. A witness will not be regarded as unavailable for purposes of showing good cause to continue the hearing if the witness has not been properly notified of the hearing date or properly subpoenaed, as applicable.

2. Issues and Proposed Resolutions.[1]

District's Issues (No. 2018110516):

1. Did Middletown's individualized education program of September 4 and 27, 2018, offer Student a free appropriate public education in the least restrictive environment such that Middletown may implement that IEP without parental consent?

2. Were Middletown's psychoeducational and academic assessments appropriate, such that Parent is not entitled to an independent educational evaluation at Middletown's expense?

As resolutions, Middletown seeks an order answering the above questions in the affirmative.

Student's Issues (No., 2019030238):

1. In the 2016-2017 school year, did Middletown deny Student a FAPE by failing to assess him for special education?

2. In the 2017-2018 school year, did Middletown deny Student a FAPE by:

[1] The ALJ has reworded and clarified some issues as stated in Student's prehearing conference statement as allowed by the holdings in *J.W. v. Fresno Unified Sch. Dist.* (9th Cir. 2010) 626 F.3d 431, 442-443, and *Ford v. Long Beach Unified Sch. Dist.* (9th Cir. 2002) 291 F.3d 1086, 1090. (But see *M.C. v. Antelope Valley Union High Sch. Dist.* (9th Cir. 2017) 858 F.3d 1189, 1196, fn. 2 [dictum].) No change in substance has been made.

a) failing to assess him in all areas of suspected disability, namely, pragmatic language, executive functioning, dysgraphia, attention difficulties and assistive technology; and

b) failing to find him eligible for special education and related services?

3. In the 2018-2019 school year, did Middletown deny Student a FAPE by:

a) failing to design an appropriate program; specifically, by:

1) failing to adequately address his anxiety and autism;

2) failing to place him in a special day class or non-public school for high-functioning students with autism;

3) failing to offer a one-to-one aide; and

4) failing to offer measurable goals;

b) terminating Student's home hospital instruction in retaliation for Parent's disagreement with its IEP offer; and

c) failing to hold a timely annual IEP team meeting?

As resolutions, Student seeks an order requiring Middletown:

1) to place Student in ANOVA – Santa Rosa, a non-public school;

2) to reimburse Parent for all costs of Student's unilateral placement in ANOVA, including transportation;

3) to reimburse Parent for Dr. Diana Trichilo's neuropsychological reports;

4) to fund Dr. Trichilo's attendance at the April 4, 2019 IEP team meeting to discuss her assessment; and

5) to provide compensatory education and services by non-public agencies according to proof.

3. Exhibits. a) Exhibits shall be pre-marked and placed in three-ring exhibit binders prior to the hearing. The parties shall use numbers to identify exhibits in a way that clearly identifies the party offering it (such as "S1" or "D2"). Each exhibit shall be internally paginated, by exhibit, or all of a party's exhibits shall be Bates-stamped. Each exhibit binder shall contain a detailed table of contents. Each party shall serve an exhibit binder containing

its respective exhibits on the other party or parties by 5:00 p.m. on April 23, 2019, in compliance with Education Code section 56505, subdivision (e)(7). At the hearing, each party shall supply an exhibit binder containing its exhibits for use by the ALJ, and a second exhibit binder for use by witnesses. The parties may not serve exhibits on OAH prior to the hearing. In the event of duplicate exhibits, the most legible version will be used.

Except for good cause shown, or unless used solely for rebuttal or impeachment, any exhibit not timely exchanged shall not be admitted into evidence at the hearing unless the ALJ rules that it is admissible.

Parties are encouraged to present resumes or curricula vitae for all professional witnesses.

Middletown shall introduce a color copy of the school calendar for each school year in question and shall have witnesses available to explain any legend notations that might be unique to Middletown.

b) Evidence of conversations at IEP team meetings shall be presented by transcript if a transcript already exists. If there is no existing transcript, it shall be presented on a flash drive.

4. Witnesses.

a) Each party is responsible for procuring the attendance at hearing of its own witnesses. Each party shall make witnesses under its control reasonably available to the other party. The parties shall schedule their witnesses to avoid delays in the hearing and to minimize or eliminate the need for calling witnesses twice or out of order. Neither party shall be permitted to call any witnesses not timely disclosed except for good cause shown, and at the discretion of the ALJ.

b) Student has identified 20 witnesses to be called at the hearing, and Middletown has identified 28 witnesses. Some of the witnesses are listed by both parties. In light of the fact that three days have been scheduled for the hearing, examination of the number of witnesses proposed would make it difficult to complete the hearing as scheduled. Therefore, at the beginning of the hearing, each party shall serve on the other party and provide the ALJ a tentative witness list, identifying the witnesses the party intends to call, as opposed to witnesses the party may call depending on the flow of the hearing and the evidence. Each revised witness list shall contain an estimate of the length of each witness's direct examination testimony. The parties shall meet and confer telephonically or by email on or before April 25, 2019, for this purpose.

c) Prior to the commencement of the due process hearing, the ALJ and the parties will discuss the length of time anticipated for cross-examination of each witness and scheduling issues for individual witnesses, and the ALJ will finalize the witness schedule. Additionally, the parties shall be prepared at the end of each day of hearing to discuss the

witnesses to be presented the next day and the time the testimony of each such witness is expected to take. The ALJ has discretion to limit the number of witnesses who testify and the time allowed for their testimony, and to exclude evidence if it is repetitive, cumulative, or insufficiently probative to justify the time it would take to hear.

5. Scope and Order of Witness Examination. Each witness shall be called to testify only once, except for rebuttal purposes, and all parties shall examine the witness on all issues when the witness is first called. The order in which the parties present their cases in chief shall be subordinate to the need for each witness to appear only once, so the parties shall establish their cases in chief during the first appearance of a witness. After the first direct and cross-examinations, each party shall be limited in examining the witness to only those matters raised in the immediately preceding examination.

6. Order of Presentation of Evidence. In an administrative proceeding, the burden of proof is ordinarily on the party requesting the hearing. (*Schaffer v. Weast* (2005) 546 U.S. 49, 56-62 [126 S.Ct. 528, 163 L.Ed.2d 387].) Here, Middletown first requested the hearing and bears the burden of proof as to its issues, and shall present its case-in-chief first, followed by Student, who bears the burden of proof as to his issues.

7. Telephonic Testimony.

a) Student's request for telephonic or other remote testimony by Drs. Jennifer Brandt, Emily Porch, Theresita Solomon and Diana Trichilo was granted. Middletown shall be prepared to furnish a telephone suitable for their testimony. It shall be Student's responsibility to provide and ensure the effectiveness of any video equipment such as Skype or other web-based method of presentation.

b) Whether a witness may appear by telephone is a matter within the discretion of the ALJ. (Cal. Code Regs., tit. 5, § 3082, subd. (g).) At present no party intends to present any witness by telephone other than those identified above. A party seeking to present a witness by telephone shall move in advance for leave to do so. The proponent of any witness appearing by telephone shall provide the proposed witness with a complete set of exhibit binders from all parties, containing all of each party's exhibits, prior to the hearing; and shall ensure that the hearing room has sound equipment that allows everyone in the room to hear the witness, and the witness to hear objections and rulings.

8. Electronic Recording of Hearing.

a) Audio Recording. The parties' requests to make audio recordings of the hearing are granted subject to the following conditions: 1) OAH's recording is the only official recording; 2) the recording will be turned on and off at the same time as the ALJ's recording, in order to avoid recording conversations while off the record; 3) no part of the recording shall be played to any witness or potential witness while the hearing is proceeding; and 4) operation of the party's recording mechanism will not be allowed to delay the hearing.

b) Video Recording. No party, witness or anyone else present may make any video recording of any part of the proceedings. Any person doing so shall be subject to sanctions.

9. Motions.

a) Student's motion to limit the testimony of Sally Kirk in order to protect attorney-client privilege was denied without prejudice to its renewal at hearing in the context of any particular question.

b) At present no other prehearing motions are pending or contemplated. Any motion filed after the day PHC statements were due shall be supported by a declaration under penalty of perjury establishing good cause why the motion was not made three days prior to the prehearing conference.

10. Compensatory Education and Reimbursement. Any party seeking reimbursement of expenditures shall present admissible evidence of these expenditures, or a stipulation to the amount of expenditures, as part of its case in chief. A party seeking compensatory education should provide evidence regarding the type, amount, duration, and need for any requested compensatory education.

11. Stipulations. Stipulations to pertinent facts, contentions or resolutions are encouraged. The parties are in particular encouraged to attempt to stipulate to the authenticity of IEP documents. Any proposed stipulation shall be submitted to the assigned ALJ in written form.

12. Conduct of Counsel and Hearing Room Decorum. Counsel, all parties, and all witnesses shall conduct themselves in a professional and courteous manner at all times. Cellular phones, pagers, recorders, and other noisemaking electronic devices shall be shut off or set to vibrate during the hearing unless permission to the contrary is obtained from the ALJ.

13. Special Needs and Accommodations.

At present neither party anticipates the need for special accommodation for any witness or party, or for the services of an interpreter. A party or participant to this case, such as a witness, requiring reasonable accommodation to participate in the hearing may contact the assigned calendar clerk identified in the scheduling order, at (916) 263-0880, or the OAH ADA Coordinator at OAHADA@dgs.ca.gov or 916-263-0880 as soon as the need is known. Additional information concerning requests for reasonable accommodation is available on OAH's website at http://www.dgs.ca.gov/oah/Home/Accessibility.aspx.

14. Hearing Closed To the Public. At the request of Parent, the hearing will be closed to the public.

15. Settlement. The parties are encouraged to continue their attempts to reach an agreement before the due process hearing. The parties shall inform OAH in writing immediately should they reach a settlement or otherwise resolve the dispute before the scheduled hearing. In addition, if a settlement is reached five days or fewer than five days before the due process hearing is scheduled to begin, the parties shall immediately inform OAH of that fact by telephone at (916) 263-0880.

IF A FULL AND FINAL WRITTEN SETTLEMENT AGREEMENT IS REACHED AFTER 5:00 P.M. THE DAY PRIOR TO HEARING, THE PARTIES SHALL LEAVE A VOICEMAIL MESSAGE REGARDING THE SETTLEMENT AT (916) 274-6035. THE PARTIES SHOULD ALSO LEAVE CONTACT INFORMATION SUCH AS CELLULAR PHONE NUMBERS OF EACH PARTY OR COUNSEL FOR EACH PARTY. THE PARTIES SHOULD SIMULTANEOUSLY EMAIL THE SIGNATURE **PAGE OF THE SIGNED AGREEMENT OR A LETTER WITHDRAWING THE CASE TO THE OAH AT** https://www.applications.dgsapps.dgs.ca.gov/oah/oahsftweb.

Dates for hearing will not be cancelled until the letter of withdrawal has been received by OAH. If an executed settlement agreement is reached pending board approval, a letter indicating such with the agreement's signature page containing all required signatures must be submitted to vacate hearing dates and schedule a status conference. If an agreement in principle is reached, the parties should plan to attend the scheduled hearing unless different arrangements have been agreed upon by the assigned ALJ. The assigned ALJ will check for messages the evening prior to the hearing or the morning of the hearing.

16. Failure to comply with this order may result in the exclusion of evidence or other sanctions.

IT IS SO ORDERED.

Dated: April 22, 2019

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Charles Marson
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CHARLES MARSON
Administrative Law Judge
Office of Administrative Hearings